COURT OF APPEALS
DECISION
DATED AND FILED

August 14, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1909-CR **Cir. Ct. No. 2009CF222**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RORY A. KUENZI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waupaca County: PHILIP M. KIRK, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings*.

Before Blanchard, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Rory Kuenzi appeals a judgment of conviction and an order denying postconviction relief. Kuenzi contends that he was denied his Sixth Amendment right to the counsel of his choice when the circuit court denied

Kuenzi's motion to substitute retained counsel for appointed counsel. Kuenzi also contends that his appointed counsel was ineffective by failing to argue that Kuenzi had a Sixth Amendment right to counsel of his choice and by failing to stipulate, before trial, that Kuenzi had a prior conviction for operating a motor vehicle under the influence of an intoxicant.[1]

¶2 In November 2009, the State charged Kuenzi with hit-and-run and homicide by intoxicated use of a motor vehicle. The criminal complaint alleged that, in October 2004, Kuenzi struck and killed a pedestrian while driving under the influence, then moved the body from the road into a ditch before driving away.

¶3 The State Public Defender appointed two public defenders to represent Kuenzi. In May 2010, the court set trial for the week of November 15, 2010.

¶4 On October 14, 2010, Kuenzi's public defenders moved for a continuance on grounds they were not prepared to go to trial due to the complexity of the case and to an interruption in their trial preparation when it appeared Kuenzi would accept a plea offer. The court denied the motion on grounds that it had been six years since the victim's death and because the interruption for plea negotiations had been only a week or two.

¶5 On October 25, 2010, Kuenzi's public defenders moved to withdraw on grounds that Kuenzi did not feel he could work well with his present counsel and that Kuenzi was attempting to secure private counsel. At a motion hearing on

[1] Kuenzi argued in his brief-in-chief that the circuit court erroneously exercised its sentencing discretion, but withdrew that argument in his reply brief.

October 26, 2010, Kuenzi's public defenders also renewed their request for a continuance. The public defenders informed the court that the SPD investigator had not filed any reports yet and that counsel needed more time to adequately prepare for trial. They also explained that communication between Kuenzi and counsel had broken down. The public defenders further informed the court that Kuenzi's family would attempt to retain private counsel if the public defenders were allowed to withdraw. Kuenzi personally informed the court that he had lost confidence in his public defenders and that his family was going to retain private counsel to represent him.

¶6 The court denied the motions to withdraw and for a continuance. The court explained that Kuenzi's public defenders were competent; that Kuenzi had expressed only common and subjective complaints that did not justify substitution of appointed counsel; and that Kuenzi did not currently have in place retained counsel to take over if appointed counsel were allowed to withdraw. The court indicated its faith in the public defenders to adequately prepare for trial as scheduled.

¶7 On October 28, 2010, Attorney Nathan Schnick faxed a letter to the circuit court stating: that he had been retained by Kuenzi's family to review the case; that Kuenzi's family had funds to retain Schnick through trial; and that Schnick would represent Kuenzi for the entirety of the case if the court would grant a continuance of "at least [sixty] days." The court wrote back that Schnick had not established that he had actually been paid to represent Kuenzi at trial, and that the court would consider substitution of counsel only if counsel established that satisfactory financial arrangements had been made for the representation.

¶8 On November 3, 2010, about nine days before trial was scheduled to commence, the court held a hearing on Schnick's motion to substitute as retained counsel for Kuenzi. Schnick informed the court that he had been retained that morning by Kuenzi's family to represent Kuenzi through trial. Schnick indicated that he needed to review discovery and possibly obtain an expert opinion, and requested to take the trial off the court's calendar and to work on rescheduling. The State opposed any continuance of the trial date, stating that eighty percent of the State's witnesses had been subpoenaed, and the State had been preparing for months and was ready to proceed. Kuenzi's public defenders stated they had no additional comments beyond what they had previously argued to the court.

¶9 The court denied the motion to substitute. The court determined that the controlling case was ***State v. Jones***, 2010 WI 72, ¶¶41-42, 326 Wis. 2d 380, 797 N.W.2d 378, which holds that an indigent defendant with appointed counsel does not have a Sixth Amendment right to counsel of his choice. The court determined that, although Schnick had been retained by Kuenzi's family to represent Kuenzi, Kuenzi was still indigent because Kuenzi could not personally afford to retain counsel. The court therefore applied the factors set forth by the ***Jones*** court in reviewing denial of a request by an indigent defendant for substitution of appointed counsel by the SPD. At the prior hearing on Kuenzi's public defenders' motion to withdraw, the court determined that it had adequately inquired into Kuenzi's dissatisfaction with counsel; "the press of the trial and … balancing the interest of the alleged victims, society and the defendant" rendered the motion untimely; and there was no indication that there had been a total breakdown in communication so as to render the public defenders ineffective.

¶10 Kuenzi proceeded to trial on November 12, 2010, with his public defenders, and the jury convicted him on both counts. Kuenzi then filed a

postconviction motion for a new trial. Kuenzi asserted that: he had been denied his Sixth Amendment right to counsel of his choice when the court denied his request to substitute in retained counsel; his public defenders were ineffective by failing to argue Kuenzi's Sixth Amendment right to counsel of his choice; and his public defenders were ineffective by failing to stipulate to Kuenzi's prior conviction for operating while intoxicated prior to opening statements.[2]

¶11 At a postconviction motion hearing, the court rejected Kuenzi's argument that he had a Sixth Amendment right to substitute retained counsel. The court determined that, because Kuenzi had been found indigent and was represented by the SPD when he requested to substitute in retained counsel, Kuenzi had no right to counsel of his choice under ***Jones***. The court explained that Kuenzi paid nothing personally to retain counsel, and that a defendant does not have a constitutional right to counsel he cannot afford. Finally, the court noted that Attorney Schnick had said only that he had been "retained," but did not say that he had "cash in hand" or that all of the details of payment had been resolved.[3] The court also rejected Kuenzi's claim of ineffective assistance of counsel based on counsel's failure to stipulate to Kuenzi's prior OWI, determining that "[i]t was lost in the testimony of this entire trial."

[2] Other claims raised in the postconviction motion have not been pursued on appeal, and we do not address them.

[3] In a subsequent letter to the parties, the court clarified that, even if Schnick had informed the court at the November 3, 2010 hearing that he had money in hand, the court still would have denied a continuance of the trial date. The court stated that it did not believe it was in the interest of justice to grant a continuance nine days before trial was scheduled to begin given the lengthy history of the litigation, and that it considered the request for a continuance "patently untimely."

¶12 Kuenzi argues that the circuit court erroneously exercised its discretion by denying Kuenzi's motion to substitute in retained counsel.[4] He argues that the circuit court failed to recognize Kuenzi's right to the counsel of his choice under ***United States v. Gonzalez-Lopez***, 548 U.S. 140, 144 (2006) (Sixth Amendment guarantees "the right of a defendant who does not require appointed counsel to choose who will represent him").

¶13 The State concedes that, once Schnick was retained to represent Kuenzi, Kuenzi had a Sixth Amendment right to counsel of his choice. The State also concedes that, in denying Kuenzi's motion to substitute counsel, the circuit court failed to recognize that Schnick qualified as "retained" counsel. The State argues, however, that the circuit court properly denied Kuenzi's motion to substitute under the test for substituting retained counsel. *See* ***State v. Prineas***, 2009 WI App 28, ¶13, 316 Wis. 2d 414, 766 N.W.2d 206 ("When making a determination whether to allow the defendant's counsel of choice to participate, the circuit court must balance that right against the public's interest in the prompt and efficient administration of justice."). The State argues that the court weighed Kuenzi's request to substitute counsel of his choice against the public's interest in the prompt and efficient administration of justice. The State points out that Schnick stated he would need a continuance of at least sixty days, and argues that the circuit court amply explained that it denied the substitution request based on the untimeliness of the motion.

[4] We note that it has now been almost four years since Kuenzi's trial in November 2010. However, this appeal was not fully briefed until July 19, 2013. Additionally, we then ordered supplemental briefing, which was completed on July 10, 2014.

¶14 The problem with the State's argument is that it asks us to conclude that the circuit court adequately considered Kuenzi's constitutional right to counsel of his choice despite the court's explicit and repeated statements that it was applying a test that did not require such consideration and in the absence of a record demonstrating that the court properly considered the issue. It is true, as the State asserts, that a circuit court must consider the public's interest in the prompt and efficient administration of justice when deciding a motion to substitute retained counsel. *See* ***id.*** And, here, the circuit court clearly considered the efficient administration of justice in denying Kuenzi's substitution motion by relying on the closeness of trial and the length of time the case had been pending. However, as the State concedes, the court was required to balance the interest of the efficient administration of justice against Kuenzi's constitutional right to counsel of his choice. *See* ***id.*** It is clear that the court did not do so.

¶15 We fail to see how the court could have weighed Kuenzi's constitutional right to counsel of his choice in light of the court's insistence that Kuenzi had no such right. Moreover, a decision to deny a motion to substitute retained counsel may not be based on the interests of expediency alone. *See* ***Carlson v. Jess***, 526 F.3d 1018, 1027 (7th Cir. 2008) (holding that the court erred by denying Carlson's motion to substitute retained counsel because the court "ignored the presumption in favor of Carlson's counsel of choice and insisted upon expeditiousness for its own sake"). Rather, a circuit court must consider factors relevant to weighing the balance between the constitutional right to counsel of one's choice and the efficient administration of justice, including: the length of the delay requested; whether competent counsel is available; whether prior continuances had been granted; any inconvenience to the parties and the court; and whether there is an improper purpose for the delay. ***Prineas***, 316 Wis. 2d 414,

¶13. Because the circuit court did not apply the correct test, we are not persuaded that the court properly exercised its discretion.

¶16 We previously directed the parties to submit supplemental briefing as to whether a retrospective hearing would be a legally available remedy if we were to determine that the circuit court applied an incorrect test when denying Kuenzi's request to substitute retained counsel. We noted that retrospective hearings have been ordered in the somewhat analogous context of a circuit court failing to make an adequate inquiry into a defendant's request to substitute appointed counsel. *See* ***State v. Lomax***, 146 Wis. 2d 356, 432 N.W.2d 89 (1988); ***State v. Kazee***, 146 Wis. 2d 366, 432 N.W.2d 93 (1988).

¶17 Kuenzi asserts in his supplemental brief that retrospective hearings are available remedies only when a circuit court did not make a timely inquiry into a defendant's request to substitute counsel. In support, he cites the supreme court's holding in ***Kazee***, 146 Wis. 2d at 374, that a retrospective hearing was the proper remedy following a circuit court's "failure to timely inquire into the factual basis for the defendant's request for new counsel." Kuenzi points out that, in ***Kazee***, the supreme court relied on the fact that "Kazee did not make known the reasons for his [request for new counsel], and the trial court did not make any inquiry of Kazee." ***Id.*** at 372. And that therefore it could not "discern from the record whether or not Kazee's complaint and implicit request had merit." ***Id.***

¶18 Kuenzi also cites the supreme court's statement in ***Lomax***, 146 Wis. 2d at 362, that "[a] judge should make a meaningful inquiry when the motion for change of counsel is made rather than summarily deny it and then conduct a retrospective hearing after the trial." He then argues that the ***Lomax*** court determined that a retrospective hearing was the proper remedy only because the

circuit court had not made any inquiry into Lomax's request to substitute counsel. *See* ***id.*** Kuenzi asserts that the cases do not contemplate a retrospective hearing after trial when the court has already held a hearing and inquired into a defendant's request to substitute counsel.

¶19 We disagree with Kuenzi's reading of ***Kazee*** and ***Lomax*** as limiting the availability of retrospective hearings to situations in which there was no factual inquiry or an inadequate factual inquiry. We see nothing in either case prohibiting retrospective hearings when a circuit court applies the wrong legal standard to a defendant's request to substitute counsel. Indeed, we discern no reason why a retrospective hearing would be available following a circuit court's inadequate inquiry into the factual basis for a defendant's substitution request, but not available when the circuit court applies the wrong legal standard. In ***Kazee*** and ***Lomax***, the circuit courts did not make any factual inquiry into the substitution requests, which seems a more egregious failing than when, as here, a court mistakenly applies an incorrect legal standard. However, the underlying problem is the same. As in ***Kazee*** and ***Lomax***, we are unable to determine whether Kuenzi should have been allowed substitution because of an inadequate proceeding. "[I]f an adequate and meaningful inquiry is possible, a retrospective determination of the appropriateness of the request for new counsel should be had rather than automatically granting a new trial." ***Kazee***, 146 Wis. 2d at 374. If the circuit court is able to conduct an adequate retrospective hearing, it shall do so; the court may receive additional evidence relevant to the proper test for substitution requests under ***Prineas.*** If the circuit court determines that Kuenzi was improperly denied his right to counsel of his choice, or if meaningful inquiry is not possible, Kuenzi is entitled to a new trial. *See* ***Kazee***, 146 Wis. 2d at 376.

¶20 Kuenzi also asserts that his public defenders were ineffective because they failed to raise Kuenzi's Sixth Amendment right to the counsel of his choice. Kuenzi asserts that, had his public defenders explained the law to the circuit court, the circuit court would have been obligated to grant Kuenzi's motion. *See* ***Strickland v. Washington***, 466 U.S. 668, 687-694 (1984) (claim of ineffective assistance of counsel "must show that counsel's performance was deficient [in that] counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and also that "the deficient performance prejudiced the defense," that is, that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable"). However, as set forth above, the circuit court rejected Kuenzi's well-developed Sixth Amendment argument in postconviction proceedings. Kuenzi does not explain why the circuit court's ruling on that argument would have been different if raised pretrial. Because the record establishes that the circuit court would have rejected Kuenzi's Sixth Amendment argument even if it had been raised by his public defenders, Kuenzi cannot show that he was prejudiced by any deficiency for failing to raise that argument.

¶21 In addition, even if we were to assume that the circuit court would have agreed with counsel regarding the appropriate test, it is not apparent based on this record that the court would have been, as Kuenzi contends, compelled to grant Kuenzi's motion. Indeed, we remand to the circuit court because we cannot conclude based on the record before us that it would have been a misuse of discretion under the correct standard to deny Kuenzi's motion.

¶22 Finally, Kuenzi argues that his public defenders were ineffective because they failed to stipulate to Kuenzi's prior OWI conviction before opening statements. He argues that, under ***State v. Alexander***, 214 Wis. 2d 628, 651, 571

N.W.2d 662 (1997), admitting evidence of the prior OWI raised the inference that Kuenzi has a bad character and a propensity to drive while intoxicated. Thus, Kuenzi asserts, counsel should have stipulated to the prior offense, which would have precluded the jury from learning that Kuenzi had a prior OWI conviction. *See* ***id.*** at 651-52. Kuenzi argues that, unlike in ***Alexander***, the error in this case was not harmless because there was not overwhelming evidence of Kuenzi's intoxication. Kuenzi points out that there was no physical evidence that Kuenzi was intoxicated and that testimony that Kuenzi had been drinking does not necessarily mean he was intoxicated. *See* ***id.*** at 652-53. He argues that evidence of the prior OWI likely led the jury to believe that Kuenzi was intoxicated when he struck the victim, and that he fled the scene to avoid another OWI conviction.[5]

¶23 Kuenzi also asserts that his public defenders compounded their error when, after failing to offer to stipulate to the OWI conviction before opening statements, the attorneys mishandled a belated attempt to stipulate. The State's opening statement indicated that the State would have to prove the element of Kuenzi's prior offense. When Kuenzi's counsel then attempted to stipulate to the prior, the State objected on grounds that it had told the jury it would prove that element. The State and Kuenzi's counsel agreed to have the court direct the jury to find that Kuenzi had a prior offense. Kuenzi argues that a court may not direct a verdict as to an element, citing ***State v. Curtis***, 144 Wis. 2d 691, 695, 424 N.W.2d 719 (Ct. App. 1988), and asserts that a court doing so can never be harmless error.

[5] It was undisputed at trial that Kuenzi struck and killed the victim. The disputed issues were whether Kuenzi was intoxicated and whether he knew he had struck the victim before driving away.

¶24 We conclude, first, that any deficiency by Kuenzi's trial counsel in failing to stipulate to Kuenzi's prior OWI before opening statements was not prejudicial to Kuenzi's defense. As to the charge of homicide by intoxicated use of a motor vehicle, the danger for prejudice from admission of Kuenzi's prior OWI conviction was that the jury would believe that Kuenzi was, in fact, intoxicated when he drove on the night of the accident. However, as the State points out, multiple witnesses testified at trial that they personally observed that Kuenzi was intoxicated on the night of the accident. We are satisfied that there was overwhelming evidence of Kuenzi's intoxication. Thus, there is no reasonable probability that the outcome of the case as to the homicide charge would have been different had the jury not learned that Kuenzi had a prior OWI conviction.

¶25 As to the hit-and-run charge, there is no logical connection between evidence of the prior OWI offense and a finding of guilt as to the hit-and-run alleged in this case. That is, it is not reasonable to conclude that evidence of a prior OWI conviction would have led the jury to believe that Kuenzi was the type of person who would have committed the acts alleged by the State—a person who would not only flee the scene, but first attempt to conceal the body of the pedestrian he had just killed. We are not persuaded by Kuenzi's argument that the jury likely believed that Kuenzi fled the scene after discovering he struck and killed a pedestrian because he feared a second OWI conviction. The types of crimes are simply too dissimilar to support a finding that evidence of the prior OWI offense would have prejudiced Kuenzi's defense against the hit-and-run charge.

¶26 Lastly, we reject Kuenzi's argument that his public defenders were ineffective because they agreed to the circuit court directing a jury finding as to

the prior OWI. Contrary to Kuenzi's assertion, that error is subject to a harmless error analysis. *See* ***State v. Harvey***, 2002 WI 93, ¶¶47-48, 254 Wis. 2d 442, 647 N.W.2d 189. For the reasons set forth above, we conclude the error was harmless.

¶27 In sum, we reverse the circuit court order as to Kuenzi's claim that he was denied his constitutional right to counsel of his choice, and remand for a retrospective hearing. As in a retrospective hearing under ***Kazee*** and ***Lomax***, the hearing here may include additional factual inquiry into the circumstances at the time of the original motion. We affirm the order as to all other issues.

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2011-12).